U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

PUBLIC COPY

[redacted]

FEB 28 2003

File: SRC-00-204-51439 Office: Texas Service Center Date:

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is described as a "Recycled Paper Cat Litter" company. It seeks to extend the beneficiary's period of temporary employment in the United States as its General Administrator. The Director, Texas Service Center, determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity and denied the petition.

On appeal, counsel asserts that the director erred in his analysis of the beneficiary's duties.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

8 C.F.R. 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

> (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
>
> (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

8 C.F.R. 214.2(l)(14)(ii) states that a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

> (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
>
> (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of

this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The United States petitioner was incorporated in 1998 and claims that it is a subsidiary of the overseas company, Fibrecycle Pty Ltd. of Australia. The petitioner declares two employees and seeks to extend the beneficiary's period of employment for three years at an annual salary of $50,000.

At issue in this proceeding is whether the petitioner has established that the beneficiary will be employed primarily in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line

supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

i. directs the management of the organization or a major component or function of the organization;

ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a letter accompanying the initial petition, the petitioner stated that the beneficiary, in her position as general administrator, would perform the following duties:

- To direct the management of our U.S. subsidiary
- To administer tests and the evaluation of product application in the U.S. market
- To develop working relationships with distributors and other potential outlets
- To initiate and manage a marketing campaign designed to educate customers about the product
- To continue our company's feasibility study to determine the possibility of a future manufacturing plant in the U.S.
- Investigate and advise on packaging requirements and needs within the industry

The petitioner implied that the beneficiary was "a professional who supervises other professionals" and added that the beneficiary "meets the 'functional' manager tests as she will oversee and direct a key and essential component to the company's operations and success."

Pursuant to a Request for Evidence dated July 12, 2000, the petitioner was requested to submit "an organizational chart of the U.S. company, specifying the beneficiary's position within the organizational hierarchy, along with the employees the beneficiary

supervises and their job titles and duties." The petitioner responded by submitting evidence that the director had requested regarding ownership of the U.S. company. However, the petitioner failed to provide the requested organizational chart or any additional information about the duties of the beneficiary or those employees to be supervised by the beneficiary.

The Center Director determined that the petitioner had failed to demonstrate that the beneficiary was to be employed in a managerial or executive capacity and denied the petition. On appeal, the petitioner restated the beneficiary's proposed job duties and concluded that, while "many of the functions were initially performed by [the beneficiary] . . . this does not mean that she was not performing duties of an executive or manager."

The petitioner provided a copy of the company business plan which includes an organizational chart. This chart predicts that the beneficiary will supervise a factory manager, an operational manager, a marketing manager, and a corporate account manager who will, in turn, supervise a total staff of 19 workers. However, there is no indication that the petitioner has actually hired any of these other proposed workers. The petitioner's evidence does not establish that the beneficiary will be primarily managing a subordinate staff of professional, managerial, or supervisory personnel who relieve her from performing nonqualifying duties.

Counsel further cites an unpublished decision involving an employee of the Irish Dairy Board wherein it was held that the beneficiary satisfied the requirements of serving in a managerial and executive capacity for the purpose of L-1 classification even though he was the sole employee of the petitioning organization. In that case the petitioner persuasively demonstrated that the beneficiary's duties would be primarily managing business operations through subcontracted facilities. In this case, the petitioner has ignored a Service request for information regarding the presence of other company personnel who would relieve the beneficiary from performing non-qualifying duties. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the Irish Dairy Board case. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). It is further noted that while 8 C.F.R. 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding.

On review, the record as presently constituted is not sufficient to demonstrate that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner's evidence does not establish that the beneficiary will be primarily managing a subordinate staff of professional,

managerial, or supervisory personnel who relieve her from performing nonqualifying duties. Nor is the record persuasive that the beneficiary will function at a senior level within an organizational hierarchy, other than in position title. Based on the minimal evidence furnished to the record, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.